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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-2083.

UNITED STEELWORKERS OF AMERICA,
AND
LOCAL 5104, UNITED STEELWORKERS OF AMERICA,
PETITIONERS,

v.

THE HOMER D. BRONSON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of the Homer D. Bronson Company in Opposition to Petition for a Writ of Certiorari.

DONALD W. HENRY,
GAGER, HENRY & NARKIS,
193 Grand Street,
Waterbury, Connecticut 06702.
(203) 574-4600

SIDNEY A. COVEN,
HOWARD I. WILGOREN,
LEPIE & COVEN,
18 Tremont Street,
Boston, Massachusetts 02108.
(617) 523-8240

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

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Counterstatement of the Question Presented.

Did the courts below properly vacate an arbitrator's award which did not draw its essence from the parties' collective bargaining agreement in that said award imposed a predischarge procedural due process hearing which had not been agreed to by the parties?

Counterstatement of the Case.

In its Petition for a Writ of Certiorari, the United Steelworkers of America (hereinafter "The Union") stated the bargaining history between itself and the Homer D. Bronson Company (hereinafter "The Company") which serves as

the underlying basis under which this case arose. The Union has also set forth the applicable contract language concerning the settlement of grievances through the arbitration process (Petition for Writ of Certiorari at Footnote 2.) The Union correctly points out that "once the arbitrator issues his award, that award shall be final and binding." (Union Brief at page 4.) However, that broad statement is subject to two very important contractual limitations. The contract clause providing for Arbitration (Article X) provides that:

> "5. The parties agree to accept the arbitrator's award as final and binding, *provided it is not contrary to law.*" [Emphasis supplied.]

Moreover, the Arbitrator's discretion has been circumscribed by the parties to the effect that:

> "3. ... he (the Arbitrator) shall, however, have no authority to add to, subtract from, or in any way modify the terms of this contract."

On October 26, 1978 Joseph Mennillo, Jr., was discharged by his foreman for insubordination after twice refusing an assignment of work.[1] The same day, in accordance with Article IX of the contract,[2] entitled "Grievances," the

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[1] Mr. Mennillo's past disciplinary record with the Company can be described as dismal at best. On November 18, 1977 he received a written warning for insubordination. On March 20, 1978, Mennillo was suspended for seven days for insubordination—the willful disobedience of direct orders from management. A further suspension for three days was imposed on April 5, 1978 for taking time off from work without permission. Arbitrators approved the action taken by the Company in each of the foregoing instances (App. 14a-15a.).

[2] ARTICLE IX

Grievances

1. All grievances will be taken up in the following manner:
(a) Between the employee and his foreman or the steward and his foreman or the employee, steward and foreman. The foreman will give his verbal answer within twenty-four (24) hours. (Continued on page 3).

Union's Vice President and Mennillo's foreman met to discuss the discharge (App. 26a.).[3] An additional meeting was held between the Company and the Union in accordance with Article IX of the contract prior to the filing by the Union for arbitration. Since the Company refused to change its position that discharge was merited, on October 29, 1979 the Union filed for arbitration.

The question as to whether the Company had just cause for discharging Mennillo was submitted to Arbitrator Alfred B. Clark. Arbitrator Clark found that Mennillo was "gravely insubordinate" in his refusal to carry out a legitimate order of his foreman (App. 27a.). Despite this finding the Arbitrator

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(b) If the verbal answer given by the foreman is not satisfactory the grievance is to be written in triplicate and shall contain:
   (1) the time, day and department;
   (2) the workers involved, if any, by name and clock number;
   (3) the nature of the grievance, Article of contract violated and remedy or adjustment requested, and one copy to be handed by the Local Union President or his designee to the Personnel Department. The Personnel Department will give a written answer to the steward within three (3) working days, unless mutually extended.

(c) If the Personnel Department's answer is not satisfactory, the Local Union President or his designee will file a request to the Personnel Department for a meeting of the Union Grievance Committee, the International Representative of the Union (meeting can be held without International Representative if he is not available) and representatives of the Company. This meeting will be held within three (3) working days. The Company will give the Union a written report of the results of this meeting within three (3) days.

(d) If the grievance is not settled at such meeting, it can be referred to arbitration pursuant to Article X hereof.

[3] "App." references are to the Appendix contained within the Petition for Writ of Certiorari filed herein.

reduced the discharge to an unpaid suspension solely because of his view that "... fundamental fairness dictates that notice and the right to a full, objective hearing be afforded prior to a deprivation" (App. 27a.).

Thereafter, the Company commenced an action in state court seeking to vacate or modify the arbitration award, arguing that the award, by requiring a predischarge hearing, was contrary to law because, by imposing such a requirement, the arbitrator had impermissibly added to the terms of the parties' agreement. The Union removed this action to federal court and counterclaimed for enforcement of the award. The Union also filed a separate action to have the award confirmed.

The United States District Court for the District of Connecticut and the Court of Appeals for the Second Circuit both vacated the arbitrator's award, holding that the Company was not required to reinstate the employee.[4] In so doing the Court of Appeals for the Second Circuit stated:

> The arbitrator violated Article X, Paragraph 3, of the agreement which states that the arbitrator has no authority to add to or modify the terms of the agreement. The union and the company had agreed to a three-step grievance and arbitration procedure to cover situations such as this and these procedures represent the contractual agreement as to due process (App. 2a.).

Reasons for Denying the Writ.

The decision by the Second Circuit in the instant case fully comports with the guidelines established by this Court in the

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[4] The district court entered judgment in favor of the company on the Union's counterclaim, as well as on its separate action to confirm the award.

Steelworkers Trilogy,[5] delineating the responsibility of the federal judiciary to set aside arbitration awards under certain circumstances.

In this case the arbitrator patently ignored the parties' agreement with respect to the process to be followed when a dispute arises as to the propriety of an action by the Employer (here, whether a particular discharge is for "just cause"). Instead the arbitrator "imposed his own brand of industrial justice" by imposing a predischarge hearing requirement which finds no support in the parties' agreement, intent or practice. Where, as here, a court determines that the award does not draw "its essence from the collective bargaining agreement" the course of action is exceedingly clear. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Steelworkers* v. *Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597.

Nor is the Second Circuit's decision in conflict with the decisions of any other circuit. Contrary to the Union's contention, the instant case is clearly distinguishable on its facts from the decision of the Eighth Circuit in *Chauffeurs, Teamsters and Helpers Local Union No. 878* v. *Coca-Cola Bottling Co.*, 613 F. 2d 716 (8th Cir. 1980), *cert. denied*, 48 U.S.L.W. 3786. Furthermore, decisions of the Fifth, Tenth and Seventh Circuits cited by Petitioner as being in conflict with the Second Circuit's decision herein, were decided on narrow grounds not here relevant.[6] In those cases the courts

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[5] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960).

[6] *Amalgamated Meat Cutters & Butchers, Local 540* v. *Neuhoff Brothers Packers, Inc.*, 481 F. 2d 817 (5th Cir. 1973); *Fabricut, Inc.* v. *Tulsa General Drivers*, 597 F. 2d 227 (10th Cir. 1979); *International Association of Machinists, District No. 8* v. *Campbell Soup Co.*, 406 F. 2d 1223 (7th Cir. 1969), *cert. denied*, 396 U.S. 820 (1969).

determined that the arbitrator acted in accordance with the authority granted by the parties in each instance. Rather, the Second Circuit's decision is consistent with this Court's decision in *Enterprise Wheel & Car Corp., supra,* and the myriad of decisions by lower courts which have set aside an arbitrator's award where it was determined that the award does not draw its essence from the parties' collective bargaining agreement.

In order to insure the continued vitality of the arbitration process and to maintain the continuing confidence of parties to collective bargaining agreements in the resolution of their disputes through arbitration, courts must be prepared to set aside awards in those limited instances where such awards are contrary to their agreement.[7]

Inasmuch as the Second Circuit's decision follows the guidelines established by this Court in the *Steelworkers Trilogy,* allocating to the courts the authority to insure that arbitration awards manifest a fidelity to the particular collective bargaining agreement under review, a grant of the instant writ is not warranted.

I. The Action Taken by the Second Circuit in Setting Aside the Arbitrator's Decision Was in Accordance with This Court's Decisions Respecting the Authority of the Federal Courts to Review Arbitral Awards.

That arbitration is the preferred tribunal for resolving labor disputes cannot seriously be disputed. However, the continued viability of the arbitration process is placed in serious jeopardy if an arbitrator is granted unlimited power

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[7] See e.g., *Detroit Coil Co.* v. *International Association of Machinists & Aerospace Workers, Lodge # 82,* 594 F. 2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840, 100 S. Ct. 79 (1979); *Torrington Co.* v. *Metal Products Workers,* 362 F. 2d 677 (2d Cir. 1966).

to resolve industrial disputes on grounds which bear no relationship whatsoever to the intentions of the parties as manifested by their collective bargaining agreement.

This Court has long recognized that the courts have an important role in the arbitration process to insure that arbitral awards comport with the particular collective bargaining agreement being interpreted. When an award does not draw its essence from the agreement the courts have an obligation to set it aside. As this Court stated in *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597:

> (A)n arbitrator is confined to interpretation and application of the collective bargaining agreement; *he does not sit to dispense his own brand of industrial justice.* He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.* [Emphasis supplied.]

In applying the foregoing principles, the Second Circuit set aside the arbitrator's award on its view that the arbitrator exceeded the scope of authority delegated to him under the agreement. That Court found that by requiring a predischarge hearing, the arbitrator "inserted procedural requirements that were not called for in the collective bargaining agreement" (App. 2a). The Second Circuit held that by so doing, "(T)he arbitrator violated Article X, Paragraph 3 of the agreement which states that the arbitrator has no authority to add to or modify the terms of the agreement" (App. 2a).

As the Second Circuit found, the parties agreed to a three-step grievance and arbitration procedure for the resolution of disputes similar to that in question here. That procedure provides the parties' sole agreement as to the scope of pro-

cedural safeguards to be accorded to an individual protesting a discharge by the Company. Such a procedure has been characterized as establishing the system of governance within an industrial setting.[8]

A careful analysis of the arbitrator's award reveals that the Company did in fact have just cause for discharging Mennillo. In finding that Mennillo was "gravely insubordinate" (App. 27a), the arbitrator clearly found that the Company had just cause for discipline. If just cause for discipline were not found, the arbitrator would not have found even a suspension appropriate. The sole reason why the discharge was overturned was the arbitrator's view that a predischarge hearing was required. In imposing this unbargained for requirement, the arbitrator could not, as none was present, point to any specific contract clause which requires such a hearing. Rather, in disregard of the grievance and arbitration terms of the contract, which define the parties' agreement respecting due process for a discharged employee, the arbitrator added a predischarge requirement to the contract. By so doing the arbitrator violated the contractual admonition prohibiting him from adding to or modifying the terms of the contract and thereby imposed "his own brand of industrial justice" upon the parties despite the express contractual language of the grievance and arbitration clauses. *Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597.

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[8] "... (C)ollective bargaining agreements provide their own administrative or judicial machinery—the ascending steps of the grievance procedure culminating in final and binding arbitration." Cox, *Reflections Upon Labor Arbitration,* 72 Harv. L. Rev. 1482, 1492 (1959).

"The collective agreement, with its grievance procedure and arbitration, can be fairly characterized as a constitution of industrial government, a government bounded by a system of law and permeated with principles of equality and procedural due process." Summers, *Industrial Democracy: America's Unfulfilled Promise,* 28 Clev. St. L. Rev. 29, 35 (1979).

Contrary to Petitioner's suggestion that the Second Circuit engaged in "plenary review of the merits" (Petition for Writ of Certiorari at page 9), that Court merely exercised the authority granted it by this Court in *Enterprise Wheel* to set aside an award which does not draw its essence from the collective bargaining agreement. As the Sixth Circuit stated in *Timken Co.* v. *Local Union No. 1123, United Steelworkers of America,* 482 F. 2d 1012, 1015 n.2 (6th Cir. 1973):

> It is axiomatic that if the arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense his 'own brand of industrial justice,' the enforcement of the award must be denied.[9]

The parties could have agreed to a predischarge hearing and could have included such a provision in their agreement. They did not choose to do so. The contract did not so provide either expressly or impliedly. Rather, the contract specifically outlined the due process agreed to by the parties in the grievance and arbitration clause. By adding a predischarge hearing the arbitrator manifested his infidelity to the contract by in effect adding a contract term not agreed to by the parties in dereliction of the express limitation on his power to do so contained in the contract. Under these circumstances the Second Circuit had no choice but to refuse enforcement of the award. *Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597.

In *Flintkote Co.,* 59 L.A. 329 (1972), the arbitrator held that a discharged employee must be reinstated because he

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[9] See also: *Detroit Coil Co.* v. *International Association of Machinists & Aerospace Workers, Lodge # 82,* 594 F. 2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840, 100 S. Ct. 79 (1979); *General Drivers, Warehousemen and Helpers, Local Union No. 89* v. *Hays & Nicoulin, Inc.,* 594 F. 2d 1093 (6th Cir. 1979); *Torrington Co.* v. *Metal Product Workers,* 362 F. 2d 677 (2d Cir. 1966).

was denied a predischarge hearing. However, the major distinction between *Flintkote* and the instant case is that the arbitrator premised his reinstatement on an express company rule requiring a hearing prior to discharge.

Here, there was no showing that the parties, either expressly or impliedly, meant the contract term "just cause" to encompass any predischarge due process hearing.[10] Rather, such an inference is specifically negated when the due process which the parties bargained for, namely the grievance and arbitration clause contained within the contract, is considered. By agreeing to such a process the parties determined that if the Company took any arbitrary action, an employee could be best protected by the grievance procedure culminating in a *de novo* hearing before an arbitrator. The process worked well here. The arbitrator found that the Company was justified in imposing discipline against a gravely insubordinate employee (App. 27a, 28a).

If this Court should uphold the arbitrator's construction of "just cause" as imposing a predischarge hearing, no employer who is a party to a collective bargaining agreement containing those terms, would ever be able to discharge any employee, irrespective of the circumstances, prior to granting a hearing.[11]

Petitioner's characterization of the Second Circuit's action as "judicial usurpation" (Petition for Writ of Certiorari at

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[10] Professor Clyde Summers in his article *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 504 (1976), stated the prevailing rule: "The employee is not entitled to a hearing before discipline is imposed, unless the contract so provides, but in arbitration he obtains a full *de novo* hearing."

[11] Inferentially left unanswered is the question as to what type of hearing would satisfy the due process standard should this Court uphold the arbitrator. For example, would the employee be entitled to the full panoply of rights found in due process hearings in other circumstances, including the right to cross-examination and representation of counsel?

page 10) is patently inaccurate. This Court in the *Steelworkers Trilogy* charged the courts with insuring that arbitration awards draw their essence from the parties' agreement. The mandate is clear. When the award manifests an infidelity to the contract it must be set aside.

Moreover, Petitioner's reliance on *Nolde Bros., Inc.* v. *Local No. 358, Bakery Workers,* 430 U.S. 243 (1977), and *Buffalo Forge Co.* v. *United Steelworkers,* 428 U.S. 397 (1976), is misplaced. The former case involved the question of whether an employer had a duty to arbitrate a dispute arising after the termination of the contract. The latter case examined the question of whether or not the parties agreed to submit a dispute to arbitration and held that where such a dispute was not arbitrable an injunction could not issue against an existing strike.

This Court has set the parameters of judicial involvement in the arbitration process. Where the award manifests an infidelity to the agreement, and the arbitrator, by adding new terms to the parties' agreement, imposes his own brand of industrial justice, the courts are obligated to set it aside in order to insure that parties maintain continued confidence in the resolution of industrial disputes through arbitration. Unless the courts are allowed to continue their limited review of arbitration awards as authorized by this Court in *United Steelworkers* v. *Enterprise Wheel & Car Corp., supra,* there will be no way to insure that an arbitrator has "stayed within the areas marked out for his consideration." 363 U.S. at 598.

II. The Second Circuit's Decision Is Not in Conflict with the Decision of Any Other Circuit.

Petitioner relies primarily upon the decision of the Eighth Circuit in *Chauffeurs, Teamsters and Helpers, Local Union No. 878* v. *Coca-Cola Bottling Co.,* 613 F. 2d 716 (8th Cir. 1980), *cert. denied,* 48 U.S.L.W. 3786 (1980) to support its

position that a conflict exists between the circuits for resolution by this Court. It is submitted that such reliance is misplaced.

In *Coca-Cola, supra,* 613 F. 2d at 720, the Eighth Circuit held that where the contract's "just cause" term is silent as to the procedure required, an arbitrator may imply from that term procedural as well as substantive terms. The circumstances surrounding the discharge in *Coca-Cola* were such that the person making the discharge did not witness the events which he determined justified the action. To the contrary, Mennillo's supervisor in the instant case decided to discharge him solely because of his insubordinate conduct committed *in his presence* (App. 26a.). There was no need for any additional investigation, as there was in *Coca-Cola.* Without admitting the correctness of the *Coca-Cola* decision, it is submitted that under the circumstances which existed herein, and in view of the finding that the employee was "gravely insubordinate," immediate discharge was warranted. In *Coca-Cola,* where all of the facts were not clear, some type of predischarge investigation may have been appropriate.

Petitioner's reliance on *Amalgamated Meatcutters & Butchers, Local 540* v. *Neuhoff Brothers Packers, Inc.,* 481 F. 2d 817 (5th Cir. 1973), *Fabricut, Inc.* v. *Tulsa General Drivers,* 597 F. 2d 227 (10th Cir. 1979), and *International Association of Machinists, District No. 8* v. *Campbell Soup Co.,* 406 F. 2d 1223 (7th Cir. 1969), *cert. denied,* 396 U.S. 820 (1969), as being in conflict with the Second Circuit's decision herein is similarly misplaced. In *Fabricut,* the Tenth Circuit merely upheld the arbitrator's well established discretion to limit the discipline to fit the misconduct. In *Campbell Soup,* the court merely enforced the arbitrator's resolution of two seemingly conflicting company rules bearing on the particular facts of that case. And in *Neuhoff Brothers,* the Fifth

Circuit enforced an arbitrator's imposition of the accepted burden of proof for discharges involving criminal intent. None of these cases raises the issue decided by the Second Circuit herein.

The Union contends that if the Second Circuit's decision is not reviewed, arbitration will somehow lose its effectiveness in setting aside "peremptory and unfair discharges." (Petition for Writ of Certiorari at page 14.) It is submitted that the impact of this case does not reach the magnitude suggested by the Union. If review is denied here, arbitrators will continue to set aside the imposition of discipline in those cases where the facts indicate that an employer acted in an arbitrary manner and without just cause within the meaning of a particular collective bargaining agreement. The decision of the Second Circuit in no way impinges upon the protection afforded employees against "peremptory and unfair discharges."

It should be reemphasized that here the employee was "gravely insubordinate." This is not the type of case where discipline was imposed for mere whim or caprice. Denial of the writ here will in no way hinder an arbitrator from countermanding an employer action where the facts indicate that the action was not for just cause. In order to insure that arbitrators stay within the bounds prescribed by this Court, and collective bargaining agreements which they interpret, the Writ of Certiorari should be denied.

Conclusion.

For all of the foregoing reasons it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DONALD W. HENRY,
GAGER, HENRY & NARKIS,
193 Grand Street,
Waterbury, Connecticut 06702.
(203) 574-4600

SIDNEY A. COVEN,
HOWARD I. WILGOREN,
LEPIE & COVEN,
18 Tremont Street,
Boston, Massachusetts 02108.
(617) 523-8240

Counsel for Respondent.